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No. 04-326

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHARLES E. SWEENEY, JR.,

Petitioner,

v.

STEVE CARTER,
Attorney General of Indiana,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

I. THIS COURT SHOULD GRANT THE WRIT TO ADDRESS PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM..... 1

A. Petitioner's claim is not procedurally defaulted. 1

B. The constitutional predicate for Petitioner's claim of ineffective assistance of counsel is "clearly established."..... 2

II. THIS COURT SHOULD GRANT THE WRIT TO ADDRESS THE DENIAL OF A CERTIFICATE OF APPEALABILITY AS TO PETITIONER'S *MIRANDA* CLAIM..... 4

CONCLUSION..... 6

TABLE OF AUTHORITIES

Cases

Baldwin v. Reese, 541 U.S. __, 124 S.Ct. 1347 (2004)..... 1

Beard v. Banks, __ U.S. __, 124 S.Ct. 2504 (2004)..... 3

Brecht v. Abrahamson, 507 U.S. 619 (1993)..... 5

McMann v. Richardson, 397 U.S. 759 (1970)..... 3

Miller-El v. Cockrell, 537 U.S. 322 (2003)..... 4, 5

Miranda v. Arizona, 384 U.S. 436 (1966)..... 4, 5

O'Sullivan v. Boerckel, 526 U.S. 838 (1999)..... 2

Porter v. Gramley, 112 F.3d 1308 (7th Cir. 1997)..... 4

Rescue Army v. Municipal Court, 331 U.S. 549 (1947)..... 5

Saffle v. Parks, 494 U. S. 484 (1990)..... 3

Strickland v. Washington, 466 U.S. 668 (1984)..... 2, 5

Sweeney v. Carter, 361 F.3d 327 (7th Cir. 2004)..... 1, 2, 5

Teague v. Lane, 489 U.S. 288 (1989)..... 2, 4

United States v. Benitez, __ U.S. __, 124 S.Ct. 2333 (2004) (Scalia, J., concurring)..... 5

Williams v. Taylor, 529 U. S. 362 (2000)..... 2, 3

Wright v. West, 505 U. S. 277 (1992) (Kennedy, J., concurring)..... 3

Statutes

28 U.S.C. § 2254(d)(1)..... 2

28 U.S.C. § 2253(c)(1)..... 4

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I. THIS COURT SHOULD GRANT THE WRIT TO ADDRESS PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

A. Petitioner's claim is not procedurally defaulted.

Respondent failed to convince the District Court or the Court of Appeals that Petitioner's ineffective assistance of counsel claim has been defaulted. The Court of Appeals considered Respondent's procedural default argument and rejected it after an extensive discussion. *Sweeney v. Carter,* 361 F.3d 327, 332-33 (7th Cir. 2004); Pet. App. A8-A11. Similarly, the District Court did not rely on procedural default but instead addressed the merits of the issue. Pet. App. A39-A40.

Respondent relies exclusively on this Court's opinion in *Baldwin v. Reese,* 541 U.S. __, 124 S.Ct. 1347 (2004), to support the argument that Petitioner's claim has been defaulted. Brief in Opposition [hereinafter "Br. Opp."] at 7-9. *Baldwin* is inapposite. In *Baldwin,* the habeas petitioner failed to cite "any case that might have alerted the court to the alleged federal nature of the claim" and failed to provide the highest state court with *any* "factual description supporting the claim." 541 U.S., at __, 124 S.Ct., at 1351.

Here, as the Court of Appeals found, Petitioner's "underlying legal theory and the facts on which it is based have remained the same throughout his post-conviction

odyssey." *Sweeney, supra,* 361 F.3d, at 333; Pet. App. A10-A11. In the Indiana Supreme Court (as in the District Court, Court of Appeals, and this Court) Petitioner urged application of the ineffective assistance of counsel test of *Strickland v. Washington,* 466 U.S. 668 (1984) to evaluate the constitutional implications of his attorneys' false assurance of immunity and resultant sixty-year prison sentence. "[Petitioner] gave the Indiana courts a 'meaningful opportunity to pass upon the substance of the claims later presented in federal court.'" *Sweeney, supra,* 361 F.3d, at 332; Pet. App. A8 (citing, *inter alia, O'Sullivan v. Boerckel,* 526 U.S. 838, 844 (1999)).

B. The constitutional predicate for Petitioner's claim of ineffective assistance of counsel is "clearly established."

Habeas corpus relief is foreclosed unless the state court determination of a petitioner's claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Respondent wrongly asserts that this Court "has not discussed the meaning of the 'clearly established' requirement." Br. Opp. 9.

In *Williams v. Taylor,* 529 U. S. 362 (2000), this Court explained that the "clearly established law" requirement of § 2254(d)(1) "codifies *Teague* [*v. Lane,* 489 U.S. 288 (1989)] to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final." 529 U.S., at 380. This Court's *Teague* jurisprudence holds the inquiry as to whether a constitutional rule is "new" (i.e. not "clearly established") is "whether the

Constitution, as interpreted by the precedent then existing [at the time of the state court decision], compels the rule." *Beard v. Banks,* __ U.S. __, __, 124 S.Ct. 2504, 2510 (2004) (citing *Saffle* [*v. Parks,* 494 U. S. 484, 488 (1990)]).

In *Williams,* this Court further clarified that "rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule." *Id.,* at 382. "Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Id.* (quoting *Wright v. West,* 505 U. S. 277, 308-309 (1992) (Kennedy, J., concurring)).

These authorities, ignored by Respondent, lead inescapably to the conclusion that Petitioner's claim is supported by "clearly established" law. This Court has stated in no uncertain terms that the "right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson,* 397 U.S. 759, 771, n. 14 (1970). And this Court has, in *Strickland, supra,* announced a rule of "general application ... designed for the specific purpose of evaluating a myriad of factual contexts" for evaluating when the right to the effective assistance of counsel is abrogated. *Williams, supra,* 529 U.S., at 382.

Contrary to Respondent's assertions, Petitioner is not asking to "create" or "invent" or "establish" a Fifth Amendment right to effective assistance of counsel. Br. Opp. 10, 11. This Court's precedent "compels the rule." *Beard v. Banks, supra.*

II. THIS COURT SHOULD GRANT THE WRIT TO ADDRESS THE DENIAL OF A CERTIFICATE OF APEALABILITY AS TO PETITIONER'S *MIRANDA** CLAIM.

Respondent concedes that a line of Seventh Circuit cases dealing with the certificate of appealability ("COA") requirement of 28 U.S.C. § 2253(c)(1) has been "abrogated" by this Court's decision in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). Br. Opp. at 12. Yet Respondent urges this Court to rely upon one such abrogated case, for the proposition that although the Court of Appeals denied a COA as to Petitioner's *Miranda* issue (Pet. App. A17-A18) and denied reconsideration (Pet. App. A19), Petitioner nonetheless could have included the *Miranda* issue in his merits brief in the Court of Appeals. Br. Opp. at 12 (citing *Porter v. Gramley*, 112 F.3d 1308 (7th Cir. 1997)).

This Court should grant the writ to address the Seventh Circuit's improper COA procedures which violate this Court's holdings that COA procedures are distinct from merits proceedings and that the denial of a COA precludes jurisdiction over the merits of a claim. *Miller-El, supra.*

Respondent argues this Court should give *res judicata* effect to the prior denial of certiorari as to the denial of a COA on the *Miranda* issue. Br. Opp. 13. In *Teague, supra*, this Court held the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case." 489 U.S., at 296 (citations omitted). "The 'variety of considerations [that] underlie denials of the writ,'" this Court wrote, "counsels against according denials of certiorari precedential value." *Id.* (citations omitted).

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* *Miranda v. Arizona*, 384 U.S. 436 (1966).

Indeed, one such consideration is this Court's "policy of strict necessity," under which constitutional issues "will not be determined if the record presents some other ground upon which the case may be disposed of ...." *Rescue Army v. Municipal Court,* 331 U.S. 549, 568-69 (1947). This consideration in and of itself calls for a procedure by which this Court should decline to consider petitions relating to the denial of a COA when a circuit court has granted a COA as to one or more issues, and the resolution of the merits of those issues may obviate the need for this Court to exercise jurisdiction. Here, for example, had the Court of Appeals correctly determined Petitioner's claim of ineffective assistance of counsel, *see* Section I, *supra,* there would have been no need for the current Petition as to denial of the COA.

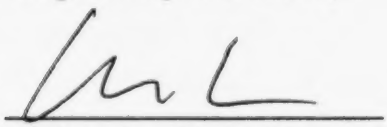
Respondent's argument that Petitioner's *Miranda* claim is not "debatable among jurists of reason," *see Miller-El, supra,* 537 U.S., at 336, must fail. The conclusion of the Court of Appeals (which disagreed with the analysis of the District Court) — that Petitioner waived his *Miranda* rights (*Sweeney, supra,* 361 F.3d, at 331; Pet. App. A7) — is completely undermined by Petitioner's belief (from counsel's advice) his answers to questions could not incriminate him.

Respondent therefore argues that Petitioner cannot meet the prejudice test of *Brecht v. Abrahamson,* 507 U.S. 619 (1993). This argument also fails. The Court of Appeals held Petitioner could "easily meet" the prejudice test of *Strickland, supra. Sweeney, supra,* 361 F.3d, at 334; Pet. App. A13. Justice Scalia has described the *Strickland* test as "even less defendant-friendly" than the *Brecht* test. *United States v. Benitez,* __ U.S. __, __, 124 S.Ct. 2333, 2342 (2004) (Scalia, J., concurring). Petitioner can "easily meet" the *Brecht* test.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,



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